Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule	)))	MB Docket No. 13-236

OPPOSITION TO PETITION FOR STAY

ION MEDIA NETWORKS, INC.
John R. Feore
Jason E. Rademacher
Cooley LLP
1299 Pennsylvania Ave., N.W.
Suite 700
Washington, D.C. 20004

TRINITY CHRISTIAN CENTER OF SANTA ANA, INC.
Colby M. May
Colby M. May, P.C.
201 Maryland Ave., NE
P.O. Box 15473
Washington, D.C. 20002

UNIVISION COMMUNICATIONS, INC.
Mace Rosenstein
Dustin Cho
COVINGTON & BURLING LLP
One CityCenter
850 10th Street NW
Washington, D.C. 20001
202-662-6000

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Summary

ION, Trinity, and Univision urge the FCC to deny the Petition for Stay Pending Judicial Review filed by Free Press, Office of Communication, Inc. of the United Church of Christ, Prometheus Radio Project, Media Mobilizing Project, Media Alliance, National Hispanic Media Coalition, and Common Cause**.**

Grant of the requested stay would radically alter the rules governing national television ownership by allowing the FCC's 2016 repeal of the UHF Discount to go into effect pending review. This would usher in a national ownership reach cap – 39% with no UHF Discount – that has never before existed, despite the FCC finding earlier this year that the FCC's repeal of the UHF Discount was arbitrary and capricious. A stay that so fundamentally changes the *status quo* should not be available to Petitioners under any circumstances.

Even assuming solely for the sake of argument, however, that a stay could be granted in these circumstances, Petitioners have utterly failed to show that a stay is warranted under the criteria traditionally used to consider such requests. First, the Petitioners' challenge of the FCC's decision to preserve the UHF Discount is likely to fail on the merits. The FCC's recent decision was clearly correct that the agency arbitrarily and capriciously eliminated the UHF Discount without considering the impact of repeal on the need for and functioning of the national audience reach cap was arbitrary and capricious. Second, Petitioners have not demonstrated any actual, certain, and irreparable harm absent a stay. Petitioners will remain free to challenge any transaction they believe is contrary to the public interest before the FCC and the federal courts. Third, should the FCC issue a stay, it will harm third parties like ION, Trinity, Univision, and their viewers. Fourth and finally, the stay will not serve the public interest. Because the petition falls far short of the requirements to issue a stay, the FCC should deny the Petitioner's request.

Before the
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In the Matter of

Amendment of Section 73.3555(e)	)	
of the Commission's Rules, National	)	MB Docket No. 13-236
Television Multiple Ownership Rule	)	

OPPOSITION TO PETITION FOR STAY

Pursuant to 47 C.F.R. Section 1.45(d) of the FCC's rules, ION Media Networks, Inc. ("ION"), Trinity Christian Center of Santa Ana, Inc. ("Trinity"), and Univision Communications, Inc. ("Univision") by their attorneys, hereby oppose the Petition for Stay Pending Judicial Review filed in the above-captioned proceeding by Free Press, Office of Communication, Inc. of the United Church of Christ, Prometheus Radio Project, Media Mobilizing Project, Media Alliance, National Hispanic Media Coalition, and Common Cause (the "Petitioners").[1]

I. INTRODUCTION

The FCC should deny Petitioners' request for stay pending judicial review because the Petition fails to satisfy any of the factors necessary to support a stay. Petitioners are unlikely to prevail on the merits because the FCC's decision to preserve the UHF Discount embodied in Section 73.3555(e) of the FCC's rules properly reversed the agency's arbitrary and capricious 2016 decision to repeal the UHF Discount while leaving the corresponding national audience

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1 *See* Petition for Stay Pending Judicial Review, Free Press, *et al.*, MB Docket No. 13-236, filed May 10, 2017 (the "Petition").

reach cap unconsidered and unchanged.[2] Petitioners will not suffer irreparable injury because they retain the right to oppose any transaction entered into as a result of the *Restoration Order*, including the right to appeal the grant of any transaction to the D.C. Circuit. No transaction will be approved or disapproved based on whether a stay is granted. In contrast, parties that rely on the UHF Discount, like ION, Trinity, and Univision, will suffer harm if the *Repeal Order* is reinstated, and the public interest strongly favors moving forward with the *Restoration Order* to allow the FCC to proceed with determining the proper course for the national audience reach cap along with any changes to the UHF Discount.

II. THE PETITION SATISFIES NONE OF THE CRITERIA FOR GRANTING A STAY AND SHOULD BE DENIED.

The four-factor test the FCC uses to evaluate requests for stay was set forth by the D.C. Circuit more than fifty years ago in *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*.[3] Under this well recognized standard, the FCC considers whether a petition has shown that: (1) it is likely to succeed on the merits; (2) petitioner will suffer irreparable harm if the stay is denied; (3) other parties will not be damaged by grant of a stay; and (4) the public interest requires grant of a stay.[4] Petitioners bear the burden of demonstrating that some combination of

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2 *See* Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, *Order on Reconsideration*, 32 FCC Rcd ____, MB Docket No. 13-236, FCC 17-40 (rel. Apr. 21, 2017) (the "*Restoration Order*"); *Report and Order*, 31 FCC Rcd 10213 (rel. Sept. 7, 2016) (the "*Repeal Order*"); *see also* 47 C.F.R. §73.3555(e)(2)(i) (the "UHF Discount").

3 259 F.2d 921, 925 (1958).

4 *See id.*; *see also Washington Metropolitan Area Transit Comm'n v. Holiday Tours*, 559 F2d 841 (D.C. Cir. 1977) (clarifying the standard set forth in *Virginia Petroleum Jobbers*).

these factors justifies a stay.[5] Only when these factors "are 'heavily tilted in the movant's favor' is the extraordinary relief of a stay appropriate."[6]

As a threshold matter, a stay is inappropriate in this case because the purpose of a stay is to maintain the *status quo* pending the outcome of an appeal.[7] While they claim to be seeking that outcome, in reality Petitioners are asking the FCC to stay the *Restoration Order*, which *preserves* the thirty-year-old UHF Discount. Far from maintaining the *status quo*, Petitioners' request would effectively repeal the UHF Discount and thereby drastically change the FCC's ownership policies. The *Repeal Order* was never operative, so the *status quo* would be preserved only by denying the Petition. Courts typically deny stay requests where the effect would be to alter rather than preserve the *status quo*.[8] In this case, the FCC's stated intention is to consider the UHF Discount as part of a proceeding examining the entire national ownership reach rule. The *Restoration Order* preserves the *status quo* while that proceeding takes place. Under these circumstances, a stay should not be available to Petitioners.

Even assuming, however, that a stay would be available to Petitioners under these circumstances, as demonstrated below, Petitioners have failed to show that any of these factors favor a stay of the *Restoration Order*.

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5 *See* WTVG, Inc. and WUPW Broadcasting, LLC, *Order*, 25 FCC Rcd 12263, 12264 (Med. Bur. 2010).

6 Implementation of Video Description of Video Programming, *Order*, 17 FCC Rcd 6175, 6177 ¶ 6 (2002).

7 *See United States v. Michigan*, 505 F. Supp. 467, 471-72 (W.D. Mich. 1980).

8 *See*, *e.g.*, *Dayton Bd. of Educ. v. Brinkman*, 439 U.S. 1358, 1358 (1978) (denying an application for stay because "the status quo . . . here can be preserved only by denying" the stay); *Golden Gate Restaurant Ass'n v. City & Cty. of San Francisco*, No. C 06-06997, 2007 WL 4591729, at *2 (N.D. Cal. Dec. 28, 2007) (denying stay that would permit an ordinance to go into effect pending appeal of judgment that ordinance was preempted).

A. Petitioners' Challenge to the *Restoration Order* Will Fail on the Merits.

Petitioners fail to make the requisite showing that their challenge to the *Restoration Order* will succeed on the merits. The FCC is the expert agency tasked with interpreting the Communications Act and administering the distribution of broadcast spectrum licenses in the public interest.[9] Courts will grant deference to the FCC's determinations on these issues as long as the agency's determinations are not "arbitrary, capricious, an abuse of discretion, or otherwise contrary to law."[10] The scope of review "is narrow"—"a court is not to substitute its judgment for that of the agency," and the agency's rules must be upheld so long as the agency has "examine[d] the relevant data and [has] articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[11] The *Restoration Order* amply satisfies these standards.

The *Restoration Order* includes a detailed explanation for its reversal of the *Repeal Order*, including the FCC's conclusion that its own earlier elimination of the UHF Discount without considering the impact of that change on the inextricably linked national audience reach cap was both unlawful and unwise.[12] The FCC determined that the *Repeal Order's* piecemeal elimination of the UHF Discount was arbitrary and capricious because it focused only on whether the underlying technical justification for the rule was still extant and did not address

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9 *See*, *e.g.*, *NCTA v. Brand X*, 545 U.S. 967, 980 (2005); *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 795 (1978) ("*NCCB*").

10 *See* 5 U.S.C. 706(2)(A). *See New Jersey Coalition for Fair Broad. v. FCC*, 574 F.2d 1119, 1125 (3d Cir. 1978).

11 *Motor Vehicle Manufacturers Ass'n v. State Farm*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

12 *Restoration Order* at ¶¶ 10-15.

whether the impact of repealing the rule – a substantial tightening of the national audience reach cap – would be consistent with current marketplace conditions or the public interest.[13]

The FCC's approach in the *Restoration Order* is plainly consistent with the Communications Act and the facts on record before the agency, and the FCC's choice to retain the UHF Discount was in no way arbitrary or capricious. Congress last addressed the national audience reach cap in 2004, raising the cap from 35% to 39% of U.S. television households and removing the FCC's obligation to reconsider the rule or related rules on a quadrennial basis.[14] In interpreting the CAA as part of its review of the FCC's 2012 Quadrennial Media Ownership Order, the Third Circuit Court of Appeals determined that the UHF Discount was so closely tied to the national audience reach cap that review of the UHF Discount would not be required on a quadrennial basis.[15] The court also held that Congress's use of the FCC-defined term "national audience reach," a phrase associated with both the national cap and the UHF Discount meant that Congress was aware of the UHF Discount when it adopted its 39% national cap and had taken the UHF Discount into account.[16] Given this history, it was hardly arbitrary or capricious for the FCC to determine that the national cap and the UHF Discount should be considered together when considering changes to either facet of the national audience limits.

The FCC's approach in the *Restoration Order* also is consistent with recent guidance from the federal courts in previous cases involving the FCC's ownership rule determinations.

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13 *See id.* at ¶¶ 13, 15.

14 Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) (the "CAA").

15 *Prometheus Radio Project v. FCC*, 373 F.3d 372, 395-97 (3d Cir. 2004) ("*Prometheus I*").

16 *See id.*

First, in *Prometheus I*, the Third Circuit Court of Appeals reversed an FCC determination that the Failing Station Solicitation Rule (the "FSSR") should be eliminated because it no longer functioned as intended due to then-current marketplace realities.[17] The court held that the FCC could not repeal the FSSR without addressing the impact of the change on the FCC's minority ownership policies underlying the rule.[18] Second, in *Prometheus III*, the Third Circuit reversed the FCC's decision to attribute ownership to certain local television stations that sell advertising on behalf of non-owned television stations in the same local market.[19] The court held that the FCC was wrong to tighten its local ownership restrictions without first determining that its existing local ownership rules continued to serve the public interest.[20] Both of these cases provide strong support for the FCC's decision in the *Restoration Order* to reinstate the UHF Discount pending a full examination of the FCC's policies underlying its national ownership rules and its determination of whether those rules continue to serve the public interest.

Petitioners argue that reinstatement of the UHF Discount was arbitrary and capricious because "all agree" that the original technical policy underlying the UHF Discount is "obsolete."[21] The FCC acknowledged in the *Restoration Order* that the digital television transition had largely ameliorated the original technical basis for the UHF Discount, but

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17 *See Prometheus Radio Project v. FCC*, 373 F.3d 372, 396 (3d Cir. 2004) (*Prometheus I*) (reversing, at Petitioners' request, FCC decision to repeal Failing Station Solicitation Rule ("FSSR") due to FCC failure to consider the impact of elimination on minority ownership policies).

18 *See id.*

19 *Prometheus Radio Project v. FCC*, 824 F.3d 33, 58 (3d Cir. 2016) (*Prometheus III*) (reversing FCC changes to rules governing Joint Sales Agreements ("JSAs") due to FCC failure to examine the continuing viability of the related local multiple ownership rules).

20 *See id.*

21 Petition at 5-9.

nonetheless determined that removing the UHF Discount without first considering the impact of that change on the national ownership rule was arbitrary and capricious.[22] That judgment was clearly consistent with the Third Circuit's approach to the FSSR in *Prometheus I*, where the court rejected the FCC's initial decision to jettison the rule due solely to marketplace realities.[23] Moreover, ION, Trinity, and Univision have argued consistently that regardless of whether the technical justification for the UHF Discount still exists, the FCC also has recognized the rule serves the important purposes of promoting programming diversity and the formation of new networks.[24] By refusing to consider the larger national ownership picture, the *Repeal Order* failed to make a determination as to whether the national ownership cap rule absent the UHF Discount continues to serve these and other important policy goals.[25] Under these circumstances, the mere fact that the original technical justification for the UHF Discount may be "obsolete" does not render arbitrary and capricious the FCC's decision in the *Restoration Order* to retain the rule pending a holistic review of the national audience reach limitations.

Petitioners next argue that the *Restoration Order* violates Congress's intent because it effectively converts the 39% national audience reach cap into a 78% national audience reach

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22 *Restoration Order* at ¶ 13.

23 *Prometheus I*, 373 F.3d at 396.

24 *See*, *e.g.*, Comments of ION Media Networks, Inc., MB Docket No. 13-236 at 6-9, 15 (filed Dec. 16, 2013); Letter from John R. Feore, counsel for ION Media Networks, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 13-236 at 1, filed July 15, 2016; Univision Communications Inc., Notice of Ex Parte Communications, MB Docket No. 13-236, filed July 6, 2016; Trinity Broadcasting Network, Notice of Ex Parte Communication, MB Docket No. 13-236, filed July 29, 2016; Comments of Univision Communications, Inc., MB Docket No. 13-236 at 4 (filed Dec. 16, 2013); Letter from John R. Feore, counsel for ION Media Networks, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 13-236 at 1, filed August 15, 2016.

25 *Restoration Order* at ¶ 15.

cap.[26] In reality, the *Restoration Order* did no such thing. Congress adopted the current 39% national cap in 2004 and the Third Circuit confirmed that, when it did so, it expected the UHF Discount to be a part of the rule.[27] It was the *Repeal Order's* elimination of the UHF Discount in isolation from any consideration of the national audience reach cap that altered the balance that Congress struck, not the *Restoration Order*. Petitioners describe at length the changes in the TV broadcast marketplace since Congress acted in 2004, and those changes unquestionably are relevant to the FCC's consideration of whether the national cap and the UHF Discount are set at appropriate levels. Those changes do not, however, justify simply eliminating the UHF Discount and ignoring the integrally related national ownership cap. Doing so ignored the guidance of the Third Circuit in *Prometheus III*, in which the court reversed the FCC for tightening the local ownership rules by attributing JSAs without first confirming that the underlying local ownership rules remained sound.[28] Marketplace changes since 2004 may justify a change to the national audience reach rules, and the *Restoration Order* leaves open the possibility of such changes.[29] But it was not arbitrary and capricious for the FCC to reject the *Repeal Order's* ham-fisted approach to addressing those changes by simply excising the UHF Discount.

Petitioners next claim that the *Restoration Order's* promise to conduct a comprehensive review of the national ownership cap is itself arbitrary and capricious because the FCC lacks authority to change the national ownership cap.[30] To be sure, there is some question about the

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26 Petition at 10-11.

27 *Prometheus I*, 373 F.3d at 396.

28 *Prometheus III*, 824 F.3d at 58.

29 *Restoration Order* at ¶ 15.

30 *See* Petition at 14-16.

FCC's authority to revise the 39% national audience reach cap.[31] At this time, however, the governing FCC determination on this point is that the FCC does, in fact, have such authority.[32] That construction of the statute is authoritative, and the FCC's reliance on that construction in the *Restoration Order* cannot be arbitrary and capricious. Moreover, as a policy matter, if the FCC decides it cannot change the 39% cap, the comprehensive review promised by the *Restoration Order* is even more important. Congress intended a 39% national audience reach cap adjusted by the UHF Discount as a safety valve; if the UHF Discount in its current form is no longer viable, the FCC should be permitted the time to design an alternative safety valve that accomplishes Congress's ends. Petitioners may prefer a result that tightens the national ownership cap with no further questions, but that desire does not render arbitrary or capricious the FCC's decision to fully examine the national ownership cap and UHF Discount in tandem.

Petitioners' argument that the *Restoration Order* erred by finding that the UHF Discount is so "intrinsically linked" to the national ownership cap that they must be considered together entirely misses the point of the FCC's action in preserving the UHF Discount.[33] Petitioners appear to be arguing that no law explicitly compels the FCC to consider these facets of the national ownership rule at the same time. Be that as it may, in *Prometheus I* the Third Circuit

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31 Indeed, ION, Trinity, and Univision in filings in this proceeding, have argued that the FCC lacks the authority to revise either the national cap or the UHF Discount. ION Comments at 11-14; Comments of Trinity Christian Center of Santa Ana, Inc. at 1-3; Univision Reply Comments at 5. Petitioners' argument, however, that the FCC has no authority to revise the national audience reach cap but does have authority to completely change that cap by eliminating the inextricably linked UHF Discount is entirely self-serving and illogical. As the FCC noted in the *Restoration Order*, if the FCC lacks authority to change the national cap, then it lacks authority to eliminate the UHF Discount as well, because the UHF Discount is part of the cap. *Restoration Order* at n.60.

32 *See Restoration Order* at n.60 (citing *Repeal Order*, 31 FCC Rcd at 10222-24).

33 *See* Petition at 16-17.

did determine that Congress considered these rules to be very closely related since they both address "national audience reach."[34] By the terms of the rules, there is no way to determine compliance with the 39% cap without reference to the UHF Discount. Moreover, less than a year ago, the Third Circuit reversed the FCC for tightening its JSA attribution rules without concluding that its existing local ownership rules remain appropriate.[35] Given this close link between the national audience reach cap and the UHF Discount, coupled with recent guidance from the courts, the FCC was well within its authority that the APA requirement of reasoned decision making requires it to consider both elements of the rule together.[36] And, even if that conclusion were wrong, the FCC was well within its discretion to determine that the approach taken in the *Repeal Order* was unwise and contrary to the public interest.[37] In either event, the FCC determination that these rules are so closely related that they should be considered together cannot be deemed arbitrary or capricious.

Petitioners also are wrong in arguing that the *Restoration Order* was arbitrary and capricious because the FCC cannot guarantee what will be the result of its forthcoming proceeding to consider the national audience reach cap.[38] Petitioners claim that it is "irrational" to subject the FCC's national reach cap and the UHF Discount to the uncertainties of a rulemaking that has yet to be conducted.[39] In reality, the FCC is required to conduct rulemakings

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34 *See Prometheus I*, 373 F.3d at 396.

35 *See Prometheus III*, 824 F.3d at 58

36 *See* Repeal Order at ¶ 13.

37 *See id. See also*, *e.g.*, *Brand X*, 545 U.S. at 980 (stating Congress has delegated to the FCC authority to "execute and enforce" the Communications Act and its public interest determinations are entitled to judicial deference).

38 *See* Petition at 17-18.

39 *See* Petition at 18.

and build a fact-based record without prejudging the outcome. As the FCC noted in the *Restoration Order*, the proceeding now promised by the FCC could, and probably should, have been held at some time after 2009 and it certainly should have been part of the proceeding that generated the *Repeal Order*.[40] The FCC's failure to act sooner on these issues, however, does not make lawful the arbitrary and capricious *Repeal Order* or make unlawful the FCC's decision on reconsideration to conduct the searching examination of the national ownership rule that the FCC was required by law to conduct in the first place.

B. Petitioners Will Not Suffer Irreparable Harm Absent a Stay.

To show irreparable harm, a petitioner must demonstrate injury that is "certain and great, actual and not theoretical, beyond remediation, and of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm."[41] Petitioners make no such showing in this case. As discussed above, the *Restoration Order* simply preserves the *status quo*. Petitioners' claims of irreparable harm make no sense in light of the Commission's decision to leave the long-standing existing rule in place.

Petitioners claim that they will be subject to irreparable injury because press and analyst reports indicate that the retention of the UHF Discount will lead to television station groups buying additional stations in excess of what they would have been permitted to acquire had the *Repeal Order* been allowed to go into effect.[42] This asserted injury is neither certain, great, actual, beyond remediation, nor imminent. Denial of a stay will leave Petitioners free to challenge any transaction that arises that Petitioners believe will injure their interests. The

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40 *See* Restoration Order at ¶ 14.

41 *See Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555, 415 U.S. App. D.C. 295 (D.C. Cir. 2015).

42 *See* Petition at 19-20.

Communications Act requires any party seeking to acquire additional television stations to file an application with the Commission and to obtain the agency's consent before consummating the transaction.[43] The Communications Act also requires that public notice be given of each such application, and permits interested parties the right to oppose any transaction.[44] Thus, Petitioners will have every opportunity to challenge particular transactions they believe will cause them harm. And, if Petitioners are unsuccessful in challenging a transaction before the FCC, they can seek review of the FCC's grant of approval in the D.C. Circuit Court of Appeals.[45]

This is an entirely adequate remedy, but strangely, Petitioners' claim of irreparable injury appears to rest on the assumption that they *will not exercise that right*. Petitioners claim that under the FCC's procedures, sale applications are typically granted 30 days after they appear on public notice "in the absence of opposition," and that this will lead to a decrease in competition and diversity.[46] Petitioners may forego their right to oppose transactions they deem in violation of the public interest, but their decision not to exercise their rights does not suffice to convert their speculative injury into one warranting a stay. If, on the other hand, Petitioners seek to oppose any forthcoming transactions, then the FCC will determine whether such transactions are in the public interest and whether Petitioners will suffer any injury at all.

Petitioners claim that absent a stay, the predicted consolidation will be unlikely to be undone even if Petitioners prevail on the merits of an appeal of the *Restoration Order*.[47] But the

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43 *See* 47 U.S.C. § 310(d).

44 *See* 47 U.S.C. § 309(b).

45 *See* 47 U.S.C. § 402(b)(6).

46 Petition at 19.

47 *See id.* at 20.

FCC has the authority to order divestiture as required by the public interest, and it has exercised that authority in the past.[48]

Ultimately, there is no basis for concluding that the media consolidation Petitioners fear will result from the *Restoration Order* will either adversely affect Petitioners or the public interest or inevitably (and irreversibly) occur before a reviewing court has a chance to resolve the issues raised by Petitioners. Petitioners' alleged harms are, therefore, not irreparable.

C. Issuance of a Stay Will Harm ION, Trinity, Univision, and Their Viewers.

Petitioners argue that the requested stay will not harm other parties because it will do no more than maintain the "status quo" pending judicial review.[49] This is false because for at least two reasons. First, as discussed above, the "*status quo*" Petitioners claim they are trying to preserve is actually a configuration of the national audience reach cap – 39% with no UHF Discount – that does not exist today and has never existed because the *Repeal Order* never went into effect. Second, the rules announced in the *Repeal Order* would cause damage to station groups like ION, Trinity, and Univision that have relied on the UHF Discount to construct new networks.

The *Repeal Order* grandfathered these combinations when they would result in station combinations in excess of 39% national audience reach absent the UHF Discount.[50] Such grandfathering is limited, however, and prohibits sale of such non-compliant station groups to a single buyer. ION, Trinity, and Univision were subject to this restriction under the *Repeal Order*, but are freed from it under the *Restoration Order*. The FCC's transferability restriction

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48 *See*, *e.g.*, *NCCB*, 436 U.S. at 814*; Fox Television Stations Inc. v. FCC*, 280 F.3d 1027, 1053 (D.C. Cir. 2002).

49 *See* Petition at 20-21.

50 *See Repeal Order*, 31 FCC Rcd at 10233-37.

for UHF Discount-dependent station groups damages those groups by shrinking the range of business opportunities they can pursue, reducing their ability to provide the most efficient, highest quality services to viewerrs.

Given Petitioners' failure to demonstrate any likelihood that they will prevail on the merits, there is no basis for restoring the transferability restrictions on ION, Trinity, and Univision, even for the limited period while appeal of the *Restoration Order* is pending.

D. Issuance of a Stay Will Not Serve the Public Interest.

Petitioners claim that protecting the public interest from diminished diversity of viewpoints as a result of consolidation provides "an unusually strong basis for staying the new rules."[51] This argument fails for at least three reasons. First, as discussed above, if Petitioners object to any particular transaction based on diminution of diversity of voices, they will have an opportunity to make that case to the FCC, and, if necessary, the courts.

Second, as the FCC emphasized in the *Restoration Order*, the previous FCC failed to consider marketplace conditions when it repealed the UHF Discount, meaning it never determined whether repeal of the UHF Discount adequately balanced the public's interest in competition and diversity.[52] Absent a finding based on current marketplace conditions that the UHF Discount is important to achieving the FCC's diversity goal, the *Restoration Order* determined that the public interest was best served by retaining the UHF Discount while the agency determines the proper configuration of the national ownership rules in a new

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51 Petition at 21.

52 *See Repeal Order* at ¶¶ 13-15.

proceeding.[53] "[T]he Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference."[54]

Third, if Petitioners were correct, then every time the FCC adopted a rule that permitted transactions to occur that would have been prohibited under previous rules, the appropriate course would be an immediate judicial stay. There is no such rule, and for good reason. In 1996, Congress expressed its strong preference for competition over regulation as its preferred mode of pursuing the public interest.[55] It would be highly inconsistent with this approach to stay every rule that loosens the FCC's broadcast ownership restrictions. In this case, the FCC did nothing more than retain the national ownership cap rules that were in place until late 2016. The public interest does not require the extraordinary relief of a stay to maintain the *Repeal Order* pending judicial review of the *Restoration Order*.

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53 *See id.* at ¶ 15.

54 *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981).

55 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

III. CONCLUSION

For the reasons set forth herein, ION, Trinity, and Univision urge the FCC to deny the Petition.

Respectfully submitted,

ION MEDIA NETWORKS, INC.

/s/

John R. Feore
Jason E. Rademacher
Cooley LLP
1299 Pennsylvania Ave., N.W.
Suite 700
Washington, D.C. 20004

TRINITY CHRISTIAN CENTER OF SANTA ANA, INC.

/s/

Colby M. May
Colby M. May, P.C.
201 Maryland Ave., NE
P.O. Box 15473
Washington, D.C. 20002

UNIVISION COMMUNICATIONS, INC.

/s/

Mace Rosenstein
Dustin Cho
Covington & Burling LLP
One CityCenter
850 10th Street NW
Washington, D.C. 20001
202-662-6000

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